United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, HOMELAND SECURITY INVESTIGATIONS, Harlingen, TX, Employer	)	**Docket No. 19-1227** **Issued: August 28, 2020**

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 13, 2019 appellant, through counsel, filed a timely appeal from an April 2, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective March 4, 2018, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On April 10, 2013 appellant, then a 45-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on April 5, 2013 she fell and injured her lower back, left knee, and hip while in the performance of duty. OWCP accepted the claim for left knee medial meniscus tear, and sprains of the left knee and leg, lumbar region, and other sites of the left hip and thigh.[4] Appellant received continuation of pay from April 15 to May 29, 2013, and OWCP paid her wage-loss compensation on the supplemental rolls beginning April 17, 2013. On December 5, 2013 Dr. Kip Owen, Board-certified in orthopedic surgery and sports medicine, performed left knee medial meniscus repair. OWCP placed appellant on the periodic compensation rolls, effective December 15, 2013. Appellant did not return to work.

Dr. M. Morgan Kuye, a Board-certified internist, also began treating appellant and advised that she could not work. Dr. Owen saw her in follow up. In reports dated June 2 and 25, 2014, Dr. Gustavo Ramos, a Board-certified neurosurgeon, noted a complaints of hip and low back pain

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the April 2, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

[4] The record indicates that appellant has additional accepted claims. Under OWCP File No. xxxxxx593, OWCP accepted an April 24, 2000 traumatic injury claim for lumbosacral joint sprain. Under OWCP File No. xxxxxx685, it accepted a November 17, 2003 traumatic injury claim for a left foot injury and entered a short form closure. Under OWCP File No. xxxxxx534, it authorized appellant medical treatment for a right knee condition from a November 22, 2004 traumatic injury, but entered a short form closure. Under OWCP File No. xxxxxx809, appellant alleged a traumatic injury on August 25, 2007 causing injury to her left knee, but a short form closure was entered. Under OWCP File No. xxxxxx519, OWCP accepted a May 20, 2008 traumatic injury for lumbar sprain. Under OWCP File No. xxxxxx898, it accepted an April 22, 2009 traumatic injury claim for left medial meniscus derangement (tear) of the posterior horn and left shoulder tear. Under OWCP File No. xxxxxx360, OWCP denied appellant's May 28, 2009 traumatic injury claim which alleged injury to her back and right foot. Appellant's claims have not been administratively combined.

radiating into the left foot. He indicated that appellant had displacement of a lumbar disc at L4-5 with myelopathy.[5]

In June 2014, OWCP referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a June 10, 2014 report, Dr. Hood noted that appellant had a significant past medical history including a lumbar discectomy and fusion on September 10, 2009, a left shoulder rotator cuff repair on October 29, 2009, a total hip replacement on November 7, 2012, and multiple left knee procedures. He described the history of injury and examination findings and advised that the disability was due to the residuals of the accepted conditions and that none of the accepted conditions had resolved. Dr. Hood opined that appellant could not return to her regular job, but could work eight hours a day in a clerical, sedentary environment.

OWCP determined that a conflict in medical opinion evidence had been created regarding appellant's work capabilities and, in October 2014, referred her to Dr. Charles Kennedy, a Board-certified orthopedist, for an impartial medical evaluation.

On October 27, 2014 Dr. Owen in a Duty Status Report (Form CA-17) advised that appellant could return to regular duty regarding her left knee only. Dr. Kuye continued to complete work status reports and advise that appellant could not work through November 14, 2014.

In a December 9, 2014 report, Dr. Kennedy noted a history that appellant had prior low back surgery and a total hip replacement. He advised that the accepted conditions had only minimally improved and had not resolved, noting that she would always have back problems, and after six knee operations, her left knee problems would continue. Dr. Kennedy opined that appellant's current disability was due to her multitude of injuries and surgeries and that she had nonaccepted anxiety and depression. He reported that she could never return to her date-of-injury job. Dr. Kennedy reported that appellant had a functional capacity evaluation (FCE) on November 20, 2014 that indicated that she could perform light-to-medium work, beginning at four hours a day. On an attached work capacity evaluation (Form OWCP-5c), he advised that she could not work eight hours daily and provided permanent restrictions.

In December 2014, appellant began pain management with Dr. Dennis Slavin, Board-certified in anesthesiology and pain medicine.

On February 24, 2015 Dr. Linda Cordell, a psychiatrist, performed a mental health assessment for surgical clearance for implantation of a spinal cord stimulator for pain control. Appellant reported that pain had severely impacted normal functioning physically and interpersonally. Dr. Cordell conducted psychological testing and diagnosed pain disorder associated with both psychological factors and a general medical condition, chronic and identified

[5] March 27 and June 9, 2014 magnetic resonance imaging (MRI) scans of the lumbar spine demonstrated surgical changes at L5-S1 and bulging disc at L4-L5. An April 6, 2016 left knee MRI scan demonstrated tricompartmental osteoarthritis, chondromalacia, a partial anterior cruciate ligament tear, a medial meniscus tear, and postoperative changes.

psychological stressors of severe, chronic pain, financial distress, and multiple financial/ social/ physical losses and hardships. She cleared appellant for a spinal cord stimulator trial.

On April 21, 2015 the employing establishment offered appellant an investigative assistant position for four hours a day with specific job duties which she declined.

Appellant continued pain management with Dr. Slavin. On October 19, 2015 Dr. Slavin additionally diagnosed myofascial pain syndrome. Dr. Owen and Dr. Kuye also continued to treat appellant. On April 22, 2016 Dr. Owen opined that appellant could perform light-duty work with regard to her knee, but that she was not able to work at all when her entire body was considered.

In response to an OWCP inquiry, by letter dated March 7, 2017, Dr. Kuye diagnosed status post lumbar hemilaminotomy with discectomy due to a displaced lumbar intervertebral disc, status post, total left hip replacement due to a superior and posterior labral tear/ and status post arthroscopic repair of a left knee medial meniscus tear. He noted the findings of a December 9, 2016 MRI scan of the lumbar spine and recommended referral to a neurosurgeon and continued pain management with Dr. Slavin.[6] Dr. Kuye continued to treat appellant.

On June 7, 2017 the employing establishment forwarded a medical record review completed by its physician, Dr. David Sack, Board-certified in occupational medicine. In his March 30, 2017 report, Dr. Sack noted the accepted conditions that appellant had not worked since the April 5, 2013 employment injury, and that she had a past history of multiple surgeries on her left knee, lumbar fusion, shoulder rotator cuff repair, and a total hip replacement on the left, all predating this injury. He indicated that some of the medical procedures were related to other claims and that appellant had a left knee arthroscopic medial meniscectomy for this claim on December 5, 2015. Dr. Sack noted that she was under the care of an internist, an orthopedic surgeon, and a pain management specialist. He recommended a second-opinion evaluation by a physiatrist to facilitate coordination of care and rehabilitative efforts.

On June 14, 2017 OWCP referred appellant to Dr. James E. Butler, III, a Board-certified orthopedic surgeon, for a second-opinion evaluation. It forwarded a statement of accepted facts (SOAF) dated June 14, 2017. This SOAF only referenced the instant claim.

In a July 19, 2017 report, Dr. Butler noted the April 5, 2013 employment injury, his review of the SOAF and medical record, and appellant's complaints of left knee and radiating low back pain with numbness, tingling, burning, and weakness. Physical examination findings included normal sensation bilaterally from C5 to S1, with bilateral lower extremity strength 5/5, and left hip examination was normal. The lumbosacral spine was tender to palpation and all lumbar tests were negative.[7] The left knee was tender to palpation. All right knee tests were negative, and the left knee demonstrated mild effusion and crepitation. There was no limb length discrepancy present. Dr. Butler provided range of motion measurements. He advised that appellant continued to have residuals due to the employment injury, noting persistent lower lumbar spine tenderness and

[6] A copy of a December 6, 2016 lumbar MRI scan is not found in the case record.

[7] The negative tests were Kernig/Brudzinski, supine straight leg raise, sitting straight leg raise, sitting root, and Patrick/Faber.

lumbar spine restricted range of motion, mild restricted left hip flexion, mild left knee swelling and crepitation, and lack of full left knee extension. Dr. Butler noted that a postoperative MRI scan of the left knee showed tricompartmental osteoarthritis and chondromalacia with tears of meniscus and ACL and opined that appellant could benefit from left total knee replacement because she had persistent left knee pain, swelling, stiffness, and functional limitations, but noted that she indicated that she had been advised against surgical intervention by her treating orthopedist, Dr. Owen. He found no evidence of neurological deficits of the lumbar spine and noted that her left hip condition was better after total hip arthroplasty. Dr. Butler indicated that surgery was not indicated for the spine or hip. He advised that appellant could not return to her usual duties as a special agent that required significant physical and strenuous activities, but that she was capable of performing sedentary duties with physical limitations, and that vocational rehabilitation services would help her find an alternative job position that required less strenuous activities. Dr. Butler indicated that MMI was reached on or about June 22, 2016. In an attached Form OWCP-5c, he noted that appellant could work eight hours daily with permanent restrictions that limited walking, standing, and operating a motor vehicle at work to two hours with no twisting, bending, stooping, squatting, kneeling, or climbing, and pushing, pulling, and lifting restricted to 10 pounds for two hours each.

On August 9, 2017 OWCP forwarded Dr. Butler's July 17, 2017 report to Dr. Kuye for his review. On August 14, 2017 Dr. Kuye indicated by a check mark that he agreed with Dr. Butler that appellant could work full time with restrictions.

By letter dated August 24, 2017, OWCP forwarded the reports from Dr. Butler and Dr. Kuye to the employing establishment and asked if it could provide a job offer within the physician's restrictions.

On October 6, 2017 the employing establishment offered appellant a permanent full-time position as an investigative assistant (IA) in Harlingen, Texas.[8] The job offer indicated that there were no special physical demands required to perform the work as it was a sedentary position and within the medical restrictions delineated in the July 19, 2017 Form OWCP-5c.[9] The position was available beginning October 23, 2017.

[8] The specific duties were identified as providing information support of case agents, investigation program support, technical communications support, office activity coordination, and law enforcement database searches, and conducting portions of investigations by processing a full range/variety of criminal and general investigative leads, from inception to completion, maintaining and developing a wide range of diverse liaison contacts and sources, and fielding impromptu telephone and face-to-face contacts with the general public. The position also required working on principal, supplemental and previously neglected leads, conducting extensive research and analysis of information in order to prepare synopsis of findings to case agents, assisting in the planning, review and reporting of data/statistical results of program or project studies, establishing protocols for incoming data, organizing and retrieving computerized data, and cultivating vital and extensive liaison contacts. The position will be responsible for independently carrying out administrative and clerical support functions, coordinating with subordinate units to implement office procedures throughout the organization, serve as timekeeper, and maintain time and attendance records/reports. The IA would purchase and requisition office supplies and equipment, conduct audits of purchase card invoices, and maintain records in accordance with General Services Administration (GSA) regulations, would attend meetings, prepare minutes, and follows up on action items with appropriate staff members.

[9] The job offer listed the specific restrictions Dr. Butler provided on the July 19, 2017 Form OWCP-5c.

By letter dated October 11, 2017, OWCP advised appellant that the position offered was suitable. It notified her that if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, her right to compensation for wage loss or a schedule award would be terminated. OWCP afforded appellant 30 days to respond.

On October 20, 2017 appellant replied that she would only accept the offered position when it complied with all of her restrictions. She further noted that her prescribed medications made her drowsy and impaired her cognitive abilities. Appellant attached an October 18, 2017 state workers' compensation work status report form in which Dr. Kuye indicated that appellant could only sit for 1 hour, could not lift or carry, should have 15-minute breaks every 2 hours, could not drive, and that she must take prescribed medications which could make her drowsy. In a treatment note of even date, Dr. Kuye advised that appellant had ongoing lower back, left hip, and left knee pain, that she struggled to find a postural position which gave relief, and that her medications impaired her abilities to work and think due to drowsiness. He opined that she was incapable of carrying out a full-time job without severe restrictions, and indicated that he would order an FCE to determine her work capacity.

On November 1, 2017 appellant declined the offered position. She wrote that the medication she took twice daily impaired her ability to think, make decisions, and concentrate, caused her to become light-headed and dizzy, and made her very drowsy and that, based on Dr. Kuye's restrictions, she could only work three hours a day. On a November 15, 2017 state workers' compensation work status report form, Dr. Kuye repeated his restrictions.

OWCP ascertained that the position was still available and, by letter dated November 17, 2017, advised appellant that her reasons for refusing the offered position were not valid. It afforded appellant an additional 15 days to accept.

On January 9, 2018 OWCP again ascertained that the position was available and, by letter dated January 12, 2018, it advised appellant that her reasons for refusing the offered position were not valid and again afforded her 15 days to accept.

On January 24, 2018 Dr. Kuye advised that appellant could not work.

By letter dated January 26, 2018, appellant indicated that she would accept the offered IA position, but had not reported to work because it was against the advice of her physician, Dr. Kuye. She further indicated that she had filed an Equal Employment Opportunity Commission (EEOC) claim against the employing establishment, alleging a hostile environment.

In a December 22, 2017 treatment note, received by OWCP on February 8, 2018, Dr. Owen noted appellant's complaint of continued left knee pain. Dr. Owen's examination demonstrated some pain over the anterior medial fat pad, no effusion, and full active and passive range of motion in flexion and extension with trace laxity, and a negative pivot shift test. He injected appellant's left knee and advised that she could work full duty.

On February 22, 2018 OWCP again ascertained that the position was available.

By decision dated February 26, 2018, OWCP terminated appellant's wage-loss compensation and schedule award benefits pursuant to section 8106(c) of FECA, effective

March 4, 2018. It noted that the position was within the restrictions provided by Dr. Butler, in his July 19, 2017 report, and affirmed by Dr. Kuye on August 14, 2017. OWCP found that Dr. Kuye did not provide a rationalized explanation relative to his restrictions as to why appellant could not perform the duties of the offered position in his subsequent reports.

On January 2, 2019 appellant, through counsel, requested reconsideration.[10] Counsel submitted the April 22, 2016 treatment note in which Dr. Owen advised that appellant could perform light duty with regard to her knee, but that she was not able to work at all when her entire body was considered.

Counsel also submitted a November 20, 2018 letter in which Dr. Kuye indicated that he would attempt to explain why, in his medical opinion, appellant was unable to return to any type of gainful employment. Dr. Kuye indicated that on April 5, 2013 appellant had suffered a significant work injury to her lower back and left knee, which were followed by surgery and physical therapy. He noted a prior history of a total hip replacement on the left, multiple left knee surgeries, and surgery to her lower back with extensive physical therapy and pain management, and that she continued to receive treatments to her left knee and lower back. Dr. Kuye indicated that he had reviewed the job offer, the termination of benefits, Dr. Butler's report, and records from Dr. Owen, and his own past treatment notes. He opined that it was clear that appellant could not perform the physical job demands of the offered position because it also required that she make clear, concise cognitive decisions as well as processing secret and sensitive documents. Dr. Kuye concluded that, based on his review of the medical records as well as OWCP documents, it was his medical opinion that appellant would qualify for the physical aspects of the offered position, but that she would not qualify to make the cognitive decisions required by the employment offer due to the side effects of her current medications, which could hinder her cognitive abilities in processing secret and sensitive documents.

Additional medical evidence received subsequent to OWCP's February 26, 2018 decision includes a January 18, 2018 report in which Dr. Jason R. Jensen, a Board-certified anesthesiologist, saw appellant for a new patient evaluation for pain management. Dr. Jensen thereafter provided reports regarding her treatment.

Dr. Owen performed knee injections on May 20 and 25, and November 28, 2018. On duty status reports (Form CA-17) dated May 25 and November 26, 2018, he indicated "no change" and on a treatment note, dated November 26, 2018, he indicated a work status of regular duty.

On state workers' compensation work status form reports dated July 13, September 28, and October 15, 2018, and January 14, 2019, Dr. Kuye indicated that appellant could not work.

Dr. Jonathan W. Bourgeois, a Board-certified anesthesiologist, saw appellant for pain management on November 1, 2018. He injected appellant's lumbar spine on February 11, 2019.

By decision dated April 2, 2019, OWCP denied modification of the February 26, 2018 decision.

[10] Counsel began representing appellant on August 9, 2018.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[11] Section 8106(c)(2) of FECA[12] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[13] To justify termination of compensation, it must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[14] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[15]

Section 10.517(a) of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[16] Section 10.516 provides that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter its finding of suitability. If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.[17]

The determination of whether an employee is capable of performing modified-duty employment is a medical question that must be resolved by probative medical opinion evidence.[18] All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[19]

Once OWCP establishes that the work offered is suitable, the burden of proof shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or

[11] *T.M.*, Docket No. 18-1368 (issued February 21, 2019); *Linda D. Guerrero*, 54 ECAB 556 (2003).

[12] *Supra* note 2.

[13] 5 U.S.C. § 8106(c)(2); *see J.K.*, Docket No. 19-0064 (issued July 16, 2020); *Geraldine Foster*, 54 ECAB 435 (2003).

[14] *A.F.*, Docket No. 19-0453 (issued July 6, 2020); *Y.A.*, 59 ECAB 701 (2008).

[15] *J.K.*, *supra* note 13; *Joan F. Burke*, 54 ECAB 403 (2003).

[16] 20 C.F.R. § 10.517(a); *J.S.*, Docket No. 19-1399 (issued May 1, 2020); *Richard P. Cortes*, 56 ECAB 200 (2004).

[17] *Id*. at § 10.516; *see Melvin James*, 55 ECAB 406 (2004).

[18] *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[19] *Id*.

justified.[20] OWCP's procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[21]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective March 4, 2018, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).

In terminating appellant's compensation benefits, OWCP relied on the opinion of Dr. Butler, who provided a second-opinion evaluation on July 19, 2017. Based on his opinion that appellant could perform sedentary duties, on October 6, 2017 the employing establishment offered appellant a sedentary position as an IA.

However, OWCP provided Dr. Butler a deficient SOAF, which did not identify the entirety of appellant's diagnosed conditions.[22] Its procedures dictate that, when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF, which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[23]

As previously noted, all conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[24] Appellant has other accepted claims not identified in the SOAF which reference additional conditions of left foot, right knee, and left shoulder tear. The physicians of record have also diagnosed conditions not identified in the SOAF. For example, Dr. Kennedy diagnosed anxiety and depression, Dr. Cordell diagnosed a pain disorder, and Dr. Kuye diagnosed a cognitive disorder. The Board finds that OWCP failed to prepare a complete SOAF; therefore, Dr. Butler did not properly consider whether these additional conditions affected appellant's ability to perform the duties of the IA position.

Based on the evidence of record, the Board finds that OWCP improperly determined that the modified IA position offered to appellant constituted suitable work within her limitations and capabilities. The record does not substantiate that OWCP properly considered the entirety of her medical conditions before terminating her wage-loss compensation and entitlement to a schedule

[20] 20 C.F.R. § 10.517(a).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a(4) (June 2013); *see J.K.*, *supra* note 13.

[22] *See N.W.*, Docket No. 16-1890 (issued June 5, 2017).

[23] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see S.C.*, Docket No. 18-1011 (issued March 23, 2020).

[24] *Supra* note 22.

award.[25] Consequently, OWCP did not meet its burden of proof to justify the termination of appellant's compensation benefits pursuant to section 8106(c)(2) of FECA.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective March 4, 2018, as it improperly determined that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2019 decision of the Office of Workers' Compensation Programs is reversed.[26]

Issued: August 28, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[25] *J.K., supra* note 13.

[26] Upon return of the case record, OWCP should consider combining the present claim with appellant's other relevant claim files.